No. 12-336

IN THE
United States Court of Appeals
for the Second Circuit

COLE FOWLKES,

Plaintiff-Appellant,

– v. –

STRUCTURAL IRON WORKERS UNION 40 ADMINISTRATIVE; DANNY DOYLE; AND KEVEN O'ROURKE,

Defendants-Appellees.

On Appeal From a Judgment of the United States District Court for the Southern District of New York

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

The plaintiff-appellant, proceeding *pro se* and *in forma pauperis* before the District Court, pled facts that would support claims for discrimination and retaliation under Title VII of the Civil Rights Act of 1964. *See* J.A. 29-67. The District Court did not reach the substance of these claims because it held that the failure to exhaust administrative remedies is a "jurisdiction[al]" defect under Title VII. *E.g.*, J.A. 73. But that is plainly not correct. *See, e.g.*, *Fernandez v. Chertoff*, 471 F.3d 45, 58-59 (2d Cir. 2006) (reaffirming that the "failure to exhaust . . . administrative remedies is not a jurisdictional defect" and remanding because the district court did not consider "whether equitable principles excused [the plaintiff's] failure").

In addition, the plaintiff-appellant pled facts that would support a claim for breach of a labor union's duty of fair representation (*see* J.A. 29-67), an implied federal cause of action under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169. *See, e.g.*, *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 74, 83-84 (1989) (discussing such a breach claim). The District Court did not consider the availability of this federal claim (*see* J.A. 68-74) but should

have done so. *E.g.*, *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008) ("If a *pro se* litigant pleads facts that would entitle him to relief, [his complaint] should not be dismissed because the litigant did not correctly identify the statute or rule of law that provides the relief he seeks."); *see also Marbury Mgmt., Inc. v. Kohn*, 629 F.2d 705, 712 n.4 (2d Cir. 1980) ("Generally a complaint that gives full notice of the circumstances giving rise to the plaintiff's claim for relief need not also correctly plead the legal theory or theories and statutory basis supporting the claim.").

Accordingly, the District Court had jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1343, and 42 U.S.C. § 2000e–5(f)(3). It was therefore permitted to exercise jurisdiction over certain pendent state-law claims pursuant to 28 U.S.C. § 1367.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The District Court entered a final judgment dismissing the plaintiff-appellant's amended complaint *sua sponte* on December 20, 2011 (J.A. 75), and the plaintiff-appellant filed a timely notice of appeal on January 10, 2012 (J.A. 76). *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

The plaintiff-appellant, Cole Fowlkes, was born a woman but identifies as a man. He has alleged facts that would establish that the defendants-appellees, a union and two of its business agents, denied him referrals at a union hiring hall based on gender stereotyping and transgender animus, and in retaliation for filing prior claims of discrimination under Title VII of the Civil Rights Act of 1964. The issues presented on appeal are:

1. Whether the District Court erred in holding that Mr. Fowlkes, proceeding *pro se*, had failed to plead facts that would support at least one viable federal cause of action.

    A. Whether Mr. Fowlkes has stated viable claims for breach of the duty of fair representation, an implied cause of action under the NLRA, where he alleged that: (1) he is a member of a union, (2) the union denied him referrals for work, and (3) the union did so based on gender stereotyping and transgender animus, and in retaliation for filing prior claims of discrimination under Title VII.

    B. Whether Mr. Fowlkes has stated viable claims for retaliation under Title VII, where: (1) he had previously filed claims of discrimination on the basis of gender, (2) he alleged facts that would establish that the defendants retaliated against him for asserting those claims, and (3) this Court has previously held that a litigant need not exhaust claims of retaliation under Title VII.

C. Whether Mr. Fowlkes has stated viable claims for discrimination on the basis of "sex" under Title VII, where: (1) he alleged that he was denied referrals and otherwise mistreated based on gender stereotyping and transgender animus, and (2) this Court has held that the failure to exhaust such claims is not a jurisdictional defect, but rather, is subject to waiver and may be excused under a variety of equitable doctrines not considered by the District Court.

2. Assuming Mr. Fowlkes pled at least one viable federal cause of action, whether the District Court erred in dismissing his pendent state-law discrimination claims.

STATEMENT OF THE CASE

This appeal raises a variety of questions about the federal remedies that are available to a transgendered member of a labor union who alleges that he was discriminated and retaliated against by his union and its officials. In so doing, this appeal also presents an opportunity for this Court to address a question left open by *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000)—specifically, whether a transgendered individual may state a claim under Title VII based on sex stereotyping and/or transgender animus.

1. According to the factual allegations and reasonable inferences drawn from the amended complaint (J.A. 29-67), the plaintiff-appellant was born a woman named "Colette Fowlkes" (J.A. 50)

but prefers to be called "Cole," identifies as a man, and holds himself out to the world as such (*see, e.g.*, J.A. 29). The defendants-appellees are his union, the Iron Workers Local Union Number 40 (hereinafter "Union"), and two of its business agents, Kevin O'Rourke and Daniel Doyle (collectively, "Defendants").[1]

Mr. Fowlkes believes that a worker should be judged by the quality of his work, not by whether he conforms to gender norms. J.A. 43. But this is not a view shared by his brethren at the Union. Mr. Fowlkes has alleged a pattern of discriminatory conduct by the Defendants and other members of the Union. *See* J.A. 43-46, 49, 53, 55.

a. During the entire period alleged in the amended complaint—from 2005 to 2011—the Defendants administered a non-exclusive hiring hall, which is used to refer both members and non-members of the Union for construction work at various job sites. *See* J.A. 34-55; *see also* J.A. 69 (Dismissal Order). In running such a hiring hall, "a labor organization has a statutory duty of fair representation under the National Labor Relations Act (NLRA) 'to serve the interests of all

[1] Mr. Fowlkes mistakenly captioned the Defendants in his amended complaint as "Structural Iron Workers – Union 40 Administrative," "Keven O'Rourke," and "Danny Doyle." (*See* J.A. 29). This brief uses the Defendants' actual names.

members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.'" *Breininger*, 493 U.S. at 73 (internal citation omitted). In addition, under Title VII of the Civil Rights Act of 1964, it is an unlawful employment practice for "a labor organization" to "refuse to refer for employment any individual" because of that individual's "sex." 42 U.S.C. § 2000e–2(c)(2).

b. In his amended complaint, Mr. Fowlkes alleges that the Defendants refused to refer him to jobs for which he was qualified and, instead, favored men with equal or less skill. J.A. 45-47, 53, 55. He also appended two types of documents to his amended complaint: spreadsheets listing his employment history through the Union, which show long periods in which Mr. Fowlkes was not referred work (*see* J.A. 36-40), and job sign-in sheets purporting to show men of the same or less skill receiving referrals with greater frequency than Mr. Fowlkes (*see* J.A. 55-61).

Mr. Fowlkes alleges that the Defendants' refusal to refer him work for which he was qualified began as "sex discrimination" but it escalated and morphed to include "retaliation." J.A. 46, 53. Beginning

in 2005 and continuing through 2007, Mr. Fowlkes was repeatedly denied referrals to job sites. Mr. O'Rourke and Mr. Doyle would make statements such as "'you would get a good job if you would act like a girl.'" J.A. 53. They also informed Mr. Fowlkes that he had "'to be nice'" and "'act like a nice girl.'" J.A. 53. And consistent with these statements, when the Defendants did offer to refer Mr. Fowlkes for jobs, they often offered him work assignments that were not as demanding, did not require the same strength, and paid less money than the work Mr. Fowlkes was capable of performing. J.A. 53.

Nevertheless, Mr. Fowlkes continued to try to obtain referrals through the Union. In 2006 and early 2007, Mr. Fowlkes would frequently go to the Union's office in an effort to obtain work. *See* J.A. 54. During one such trip, Mr. Fowlkes questioned referrals to an individual who was not a member of the Union, a Jamaican male. J.A. 53-54. This "angered" Mr. Doyle, who was overheard telling this non-member: "'Don't let this come back in my direction.'" J.A. 54. Thereafter, the Jamaican male assaulted Mr. Fowlkes with a metal object, fracturing his nose and requiring his hospitalization. J.A. 50-51.

In response, Mr. Fowlkes filed a charge with the Equal Employment Opportunity Commission and, later, an action in the United States District Court for the Southern District of New York. *Fowlkes v. Structural Iron Workers Local 40*, No. 08-cv-1914 (S.D.N.Y.) (complaint received on Jan. 25, 2008); *see* J.A. 69-70 (Dismissal Order) (referring to this earlier action). The EEOC issued a "Right to Sue" Letter on July 13, 2007, but Mr. Fowlkes waited more than five months before filing suit in the District Court. J.A. 69. Based on these facts, the District Court (Kaplan, J.) held that Mr. Fowlkes's action was time-barred; it entered a judgment to that effect on March 17, 2010. J.A. 70.

Things got worse for Mr. Fowlkes after he pressed this earlier lawsuit. According to the amended complaint filed in this action, the Defendants' conduct "escalated" and "became more constant" after Mr. Fowlkes initiated "legal p[roceedings]" in 2007 and 2008. J.A. 53. The "passing[s] over" became "more frequent" and Mr. Fowlkes was "more constant[ly]" told that he would get work only if he "act[ed] like a girl." J.A. 53.

The amended complaint also chronicles a situation in 2008 in which a welder harassed Mr. Fowlkes because he was no longer "'a nice

quiet girl,'" but now holds himself out as a "guy." J.A. 43. This harassment resulted in a confrontation in which the welder threw objects at Mr. Fowlkes, nearly causing a serious accident on an elevated job site, 13 floors above the ground. J.A. 44. Instead of addressing this situation, the Defendants did nothing and suggested that Mr. Fowlkes would get more work if "he acted with a femin[ine] character or worked with less musc[le]." J.A. 44.

In 2009, Mr. Fowlkes was referred for a total of only 23 hours of work during the entire year. J.A. 38, 45. Not surprisingly, his name was at the "top of the out[-]of[-]work list" and should have been given preference as such. J.A. 45. But that had no bearing on the referrals he received from the Defendants, and he was frequently left "without an assignment." J.A. 45. When Mr. Fowlkes complained to Mr. O'Rourke, he responded: "'[W]ell you're suing us.'" J.A. 45. And Mr. Doyle similarly stated: "'[W]ell you should[n't have] tried to sue us.'" J.A. 45.

This pattern of retaliation and discrimination continued in 2010. Mr. Fowlkes learned that Mr. O'Rourke had received calls from prospective employers asking about Mr. Fowlkes's availability. J.A. 47. But Mr. O'Rourke would refer other individuals of "lesser skill than"

Mr. Fowlkes. J.A. 47-48. Mr. Doyle engaged in similar behavior; he referred non-members of less skill over Mr. Fowlkes. J.A. 47-48.

In 2011, Mr. Fowlkes worked a total of 67 hours based on referrals he had received from the Union. J.A. 40, 49. When he complained, Mr. Doyle told him that he "could forget about getting any work from him," and Mr. O'Rourke stated that he would prefer to see Mr. Fowlkes "homeless." J.A. 49. Still, Mr. Fowlkes would call the Defendants virtually every morning requesting work, and he continued to maintain his union membership. J.A. 49; *see also* J.A. 34-35.

2. On July 29, 2011, Mr. Fowlkes initiated the present action in the United States District Court for the Southern District of New York by filing a complaint (J.A. 6-16) and a request to proceed *in forma pauperis* (J.A. 4-5). The complaint alleged that, beginning in 2005 and continuing largely unabated through 2011, the Defendants denied him job referrals because of his gender. *See* J.A. 6-16.

The complaint was never served upon the Defendants. Instead, on October 13, 2011, the District Court (Preska, C.J.) screened Mr. Fowlkes's request and complaint for basic sufficiency. *See* J.A. 17-28; *see also* 28 U.S.C. § 1915(e)(2)(B) (authorizing a district court to screen

an *in forma pauperis* complaint at any time). The District Court granted Mr. Fowlkes's request to proceed *in forma pauperis* but directed him to file an amended complaint. J.A. 17-28.

The District Court reasoned that Mr. Fowlkes had failed to allege facts tending to establish that he had exhausted his administrative remedies. J.A. 22-23. Believing that the failure to exhaust was a "jurisdiction[al]" component of any claim under Title VII, the District Court stated that "it is not clear that the Court has subject matter jurisdiction over this action." J.A. 23. To remedy this uncertainty, the District Court granted Mr. Fowlkes leave to amend his complaint and directed him to "allege whether he exhausted his administrative remedies for his Title VII claim." J.A. 23.

The District Court also held that the original complaint fell short of the notice pleading requirements of "Rule 8 of the Federal Rules of Civil Procedure." J.A. 25. Although the District Court acknowledged that this rule only "requires 'a short and plain statement of the claim showing that the pleader is entitled to relief'" (J.A. 25 (quoting Fed. R. Civ. P. 8(a)(2)), it went on to find a variety of perceived deficiencies with the original complaint (J.A. 26). And in granting leave to amend, the

District Court issued specific instructions mandating the content and form of the putative amended complaint. *See* J.A. 27 (mandating, "[t]o the greatest extent possible," the pleading of specific facts).[2]

On November 29, 2011, Mr. Fowlkes filed an amended complaint. J.A. 29-67. This complaint added factual detail not included in the original complaint. For instance, it alleged instances of discrimination by year (J.A. 41-54), added detail about an alleged gender-motivated assault (J.A. 50-54), and included instances where the defendants had "retaliat[ed]" against Mr. Fowlkes for pursuing his earlier claims of discrimination (J.A. 45-48). It also specifically invoked Title VII of the Civil Right Act of 1964 and referenced pendent state-law claims for discrimination under the New York State Human Rights Law, N.Y. Exec. Law §§ 290–297, and the New York City Human Rights Law, N.Y. City Admin. Code §§ 8-101–8-131. J.A. 46.

Like the original complaint, the amended complaint was never served upon the Defendants. Instead, on December 20, 2011, the District Court, again acting *sua sponte* under 28 U.S.C. § 1915(e)(2)(B),

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[2] This Court has held that a near-identical set of instructions was given in error and that there "was no basis for the imposition of such mandatory guidelines." *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 191-92 (2d Cir. 2008).

issued an order dismissing Mr. Fowlkes's amended complaint "under the doctrines of issue and claim preclusion and for lack of subject matter jurisdiction." J.A. 74. The court held that any claims that took place before May 29, 2007, the date on which Mr. Fowlkes filed his initial charge with the EEOC, were barred by his earlier action. J.A. 72. (Mr. Fowlkes does not challenge this aspect of the District Court's decision on appeal.) With regard to his more recent claims, the court held that it did "not have jurisdiction" because Mr. Fowlkes had failed to allege that he had exhausted his administrative remedies before the EEOC. J.A. 73; *see also* J.A. 74 (dismissing the amended complaint pursuant to Fed. R. Civ. P. 12(h)(3)). It therefore declined to exercise jurisdiction over Mr. Fowlkes's pendent state-law claims. J.A. 73-74.

Although the District Court acknowledged its duty to construe *pro se* pleadings to "raise the 'strongest [claims] they suggest'" (J.A. 68-69 (alteration in original)), the court did not consider whether Mr. Fowlkes had pled facts that would support any other federal claim beyond discrimination—such as retaliation or breach of a union's duty of fair representation (*see* J.A. 73-74). In fact, the District Court did not

mention or discuss Mr. Fowlkes's allegations that the Defendants had retaliated against him following the pursuit of his earlier action. *See id.*

A separate judgment was entered on December 20, 2011. J.A. 75. This timely appeal followed. J.A. 76.[3]

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal of a complaint under 28 U.S.C. § 1915(e)(2)(B). *E.g.*, *McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir. 2004). That said, on an appeal from a judgment dismissing a complaint for lack of subject matter jurisdiction, this court reviews any "factual findings for clear error and legal conclusions *de novo*, accepting all material facts alleged in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." *Liranzo v. United States*, 690 F.3d 78, 84 (2d Cir. 2012). To the extent that there is any tension between these standards,

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[3] Mr. Fowlkes initially brought this appeal on a *pro se* basis. On July 26, 2013, however, this Court entered an order directing the Clerk "to secure *pro bono* counsel." Order at 1, *Fowlkes v. Structural Iron Workers Union 40 Admin.*, No. 12-336 (2d Cir. July 26, 2013). The Court noted that "the record suggests a possibly meritorious claim." *Id.* Thereafter, the Clerk appointed the undersigned counsel to represent Mr. Fowlkes on a *pro bono* basis. Order at 1, *Fowlkes v. Structural Iron Workers Union 40 Admin.*, No. 12-336 (2d Cir. Oct. 17, 2013).

this Court need not try to alleviate it. The District Court did not make any factual findings, and it erred as a matter of law when it held that the failure to exhaust administrative remedies is a jurisdictional defect under Title VII. J.A. 73-74.

SUMMARY OF THE ARGUMENT

The District Court's judgment is premised on the assumption that Mr. Fowlkes's failure to exhaust his administrative remedies stood as a jurisdictional barrier to the courthouse doors. J.A. 22-24, 73-74. That assumption was made in error. This Court has repeatedly held that "'the exhaustion requirement, while weighty, is not jurisdictional.'" *Fernandez*, 471 F.3d at 58 (quoting *Boos v. Runyon*, 201 F.3d 178, 182 (2d Cir. 2000)); *see also Francis v. City of New York*, 235 F.3d 763, 767 (2d Cir. 2000) (similar); *Pietras v. Bd. of Fire Comm'rs*, 180 F.3d 468, 474 (2d Cir. 1999) (similar). It may be excused under a variety of equitable principles that the District Court never considered here. *Compare Fernandez*, 471 F.3d at 59, *with* J.A. 73-74.

But even beyond this foundational error, the District Court was required to construe Mr. Fowlkes's amended complaint to "raise the 'strongest [claims] that [it] suggest[s]'"—an obligation that the District

Court itself acknowledged. J.A. 69 (quoting *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474-74 (2d Cir. 2006) (per curiam)). The District Court, however, failed to meet that obligation.

Under this Court's precedents, the District Court was required to determine whether Mr. Fowlkes's factual "allegations are doomed to fail under *any* available legal theory." *Phillips v. Girdich*, 408 F.3d 124, 128 (2d Cir. 2005) (emphasis added). Thus, in construing a *pro se* pleading to determine whether it states a viable claim, the district "court's imagination should be limited only by [the plaintiff's] factual allegations, not by the legal claims set out in his pleadings." *Id.*; *see also Thompson*, 525 F.3d at 209 ("If a *pro se* litigant pleads facts that would entitle him to relief, [his complaint] should not be dismissed because the litigant did not correctly identify the statute or rule of law that provides the relief he seeks."); *Bertin v. United States*, 478 F.3d 489, 491-92 (2d Cir. 2007) (construing a *pro se* litigant's complaint to raise claims not addressed by the district court).

Applying those principles here, Mr. Fowlkes's allegations support at least three potentially viable federal causes of action—any one of

which is sufficient to confer federal-question jurisdiction under 28 U.S.C. § 1331:

First, Mr. Fowlkes has pled facts that would support a viable claim for breach of the Union's duty of fair representation. In *Breininger v. Sheet Metal Workers*, the Supreme Court specifically held that a union that refers workers for employment through a hiring hall has a duty "to exercise [that authority] in a nonarbitrary and nondiscriminatory fashion." 493 U.S. at 88. The Supreme Court found an implied cause of action for breach of this duty, explaining that such a claim will "'arise under' the NLRA" and therefore may be filed directly in a district court. *Id.* at 83. As explained in more detail below, Mr. Fowlkes has alleged that he is a member of a union (J.A. 34-35, 49); that the Defendants, a union and two of its officials, denied him referrals for work (J.A. 45-47, 53, 55); and that they did so on the basis of Mr. Fowlkes's gender and in retaliation for bringing a previous action for discrimination (J.A. 43-46, 49, 53, 55). This is more than sufficient to state a claim for breach of the duty of fair representation.

Second, Mr. Fowlkes has pled facts that would support a claim for retaliation under Title VII. That title makes it unlawful for "a labor

organization to discriminate against any member thereof . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under" Title VII. 42 U.S.C. § 2000e–3(a). Thus, to "state a claim for retaliation in violation of Title VII, a plaintiff must plead facts that would tend to show that: (1) she participated in a protected activity known to the defendant; (2) the defendant took an employment action disadvantaging her; and (3) there exists a causal connection between the protected activity and the adverse action." *Patane v. Clark*, 508 F.3d 106, 115 (2d Cir. 2007) (per curiam). Mr. Fowlkes has included allegations that satisfy each of these elements; he pled that: (1) he had initiated prior legal proceedings under Title VII (J.A. 53); (2) the Defendants denied him referrals to which he was otherwise entitled (J.A. 45-47, 53, 55); and (3) there was a causal connection between the above two occurrences (J.A. 45, 53).

Finally, Mr. Fowlkes has pled facts that would support a claim for discrimination "because of . . . sex" under Title VII. 42 U.S.C. § 2000e–2(c)(2). The amended complaint includes allegations, and supports reasonable inferences, that the Defendants denied Mr. Fowlkes referrals based on gender stereotypes (*e.g.*, he didn't "act like a nice

girl," J.A. 53) and based on transgender animus (*e.g.*, he "used to be a nice quiet girl" but now holds himself out as a "guy," J.A. 43). Although these theories of discrimination present questions of first impression in this Circuit, *see, e.g.*, *Simonton*, 232 F.3d at 38, the Supreme Court has recognized that sex stereotyping based on gender-nonconforming behavior is an impermissible form of sex discrimination under Title VII. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (four-justice plurality); *accord id.* at 259-60 (White, J., concurring) (agreeing that the plaintiff could prove discrimination based on gender stereotypes); *id.* at 266 (O'Connor, J., concurring) (same). Mr. Fowlkes has pled facts that would establish just this sort of gender stereotyping, including the mistaken perception that Mr. Fowlkes was incapable of handling the same capacity of work as his non-transgendered counterparts. *See* J.A. 53. Moreover, transgender animus—discrimination because an individual has *changed* gender identification—is, itself, discrimination "because of . . . sex." As one judge poignantly explained using religious converts to illustrate his point:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of

> discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by [Title VII].

Schroer v. Billington, 577 F. Supp. 2d 293, 306 (D.D.C. 2008).

Nor is the requirement of exhaustion necessarily an impediment to Mr. Fowlkes's claims of discrimination under Title VII. Because a plaintiff's "failure to exhaust his administrative remedies is not a jurisdictional defect, it is subject to equitable defenses." *Fernandez*, 471 F.3d at 58. Mr. Fowlkes can avail himself of two such defenses here: the futility and reasonably-related doctrines. As explained in more detail below, at the time that Mr. Fowlkes filed his complaint in the District Court (in 2011), the EEOC had taken a fixed position that a transgendered individual could not bring a claim for sex discrimination; exhausting any such claim therefore would have been futile. In addition, this Court has recognized that exhaustion is not required where, as may be the case here, the more recent claims of discrimination are reasonably related to claims of discrimination included in an earlier charge that was filed with the EEOC. *E.g.*, *Almendral v. N.Y. State Office of Mental Health*, 743 F.2d 963, 967 (2d Cir. 1984). At the very least, then, remand is appropriate for the

District Court to "consider whether equitable principles excused [Mr. Fowlkes's] failure to exhaust his administrative remedies." *Fernandez*, 471 F.3d at 59.

Lastly, if this Court concludes that Mr. Fowlkes has pled at least one viable federal cause of action, then he should be allowed to proceed on his pendent state-law claims, *see* 28 U.S.C. § 1367—claims that do not require the exhaustion of administrative remedies, *see* N.Y. Exec. Law § 297(9) ("Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages."); N.Y. City Admin. Code § 8-502 (requiring only that a plaintiff filing a claim under the New York City Human Rights Law serve a copy of the complaint upon the City). As a result, the judgment of the District Court should be reversed and the case should be remanded with instructions that the amended complaint be served upon the Defendants.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT MR. FOWLKES DID NOT PLEAD FACTS THAT WOULD SUPPORT A VIABLE FEDERAL CAUSE OF ACTION.

"On occasions too numerous to count," this Court has "reminded district courts that 'when [a] plaintiff proceeds *pro se*, . . . a court is obligated to construe his pleadings liberally.'" *Sealed Plaintiff*, 537 F.3d at 191 (quoting *McEachin*, 357 F.3d at 200). As the Supreme Court observed even after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), "'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). Accordingly, the "dismissal of a *pro se* claim as insufficiently pleaded is appropriate only in the most unsustainable of cases." *Boykin v. KeyCorp*, 521 F.3d 202, 216 (2d Cir. 2008) (Sotomayor, J.).[4]

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[4] In addition, this Court has "repeatedly cautioned" against the practice of dismissing a *pro se* litigant's "claims *sua sponte* without giving him a chance to be heard in opposition." *Thompson*, 525 F.3d at 209-10 n.3; *see also McEachin*, 357 F.3d at 200 (describing such dismissals as "disfavored"); *Benitez v. Wolff*, 907 F.2d 1293, 1295 (2d Cir. 1990) (per curiam) (calling such dismissals "draconian"). In fact, this Court has stated that a *sua sponte* "'dismissal in such a manner may be, "by itself, grounds for reversal."'" *Thompson*, 525 F.3d at 210 n.3 (quoting *Snider v. Melindez*, 199 F.3d 108, 113 (2d Cir. 1999), which

In order to ferret out only those cases that are truly unsustainable, a district court is obligated to construe *pro se* pleadings "'to raise the strongest [claims] that they suggest.'" *Triestman*, 470 F.3d at 472. This requires a district court to search beyond the labels and legal theories that a *pro se* litigant might advance in his complaint; it requires the district court to determine whether the plaintiff's "*factual allegations*" might be said to support *any* potentially viable claim. *Phillips*, 408 F.3d at 130 (emphasis added); *see also Albert v. Carovano*, 851 F.2d 561, 571 n.3 (2d Cir. 1988) (en banc) ("The failure in a complaint to cite a statute, or to cite the correct one, in no way affects the merits of a claim. Factual allegations alone are what matters."); *accord McEachin*, 357 F.3d at 199 n.2; *Marbury Mgmt.*, 629 F.2d at 712 n.4. As a result, this Court has not hesitated to review a plaintiff's factual allegations to consider legal theories never addressed by the district court, *e.g.*, *Bertin*, 478 F.3d at 491-92, and it has stated that reversal is appropriate "'whenever a liberal reading of the complaint

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in turn quotes *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1365 (2d Cir. 1985) (Friendly, J.)). Despite these warnings, the District Court did precisely that—it dismissed Mr. Fowlkes's amended complaint *sua sponte* without offering him an opportunity to be heard in opposition. *See* J.A. 73-74.

gives any indication that a valid claim might be stated,'" *McEachin*, 357 F.3d at 201.

In the present case, the question thus becomes whether Mr. Fowlkes's factual allegations can be construed to support any viable federal claim. There are at least three such claims available here: (A) breach of the Union's duty of fair representation; (B) retaliation under Title VII; and (C) discrimination because of sex under Title VII.

A. Liberally Construed, the Amended Complaint Pleads Viable Claims for Breach of the Union's Duty of Fair Representation.

A labor organization's duty of fair representation is inferred under the NLRA, and the breach of that duty gives rise to a federal cause of action that may be brought in federal district court. *Breininger*, 493 U.S. at 73-74, 83-84. This Court does not appear to have addressed the contours of this duty, at least as it relates to referrals at union hiring halls, but the Supreme Court and several sister circuits have spoken to this precise issue.

1. A Union Breaches Its Duty of Fair Representation When It Runs a Hiring Hall in a Discriminatory Manner.

In *Breininger v. Sheet Metal Workers*, a member of a labor union alleged that he was discriminated against in job referrals at a non-exclusive hiring hall in retaliation for his political opposition to the union's leadership. 493 U.S. at 70-73. The member brought two claims directly in federal district court: (1) an alleged breach of the union's duty of fair representation, and (2) a claim that the union's leadership violated the Labor-Management Reporting and Disclosure Act of 1959. *Id.* at 72. The lower courts had apparently divided over whether the former claim could be brought in federal district court, or whether it fell within the exclusive province of the Labor Management Relations Board. *See id.* at 72-73.

The Supreme Court explained that it had "long recognized that a labor organization has a statutory duty of fair representation under the [NLRA] 'to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.'" *Id.* at 73 (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)). Although the Board had held

that "violations of the duty of fair representation might also be unfair labor practices" within the Board's jurisdiction, the Supreme Court held that "the District Court was not deprived of jurisdiction" to hear "suits alleging a breach of the duty of fair representation." *Id.* at 73-74. In fact, the duty predates the prohibition on unfair labor practices by labor organizations under the Labor Management Relations Act, *id.* at 79, and had been said to "'arise under'" the NLRA, *id.* at 83. As a result, the Supreme Court held that district courts could assume jurisdiction over breach claims under 28 U.S.C. § 1337(a) and, presumably, § 1331. *See id.* at 83-84.

In the process of resolving these jurisdictional issues, the Supreme Court was called upon to address whether the plaintiff had stated a fair-representation claim "in the hiring hall setting." *Id.* at 87. The union had argued that, because it was "acting essentially as an employer in matching up job requests," it "does not 'represent' the employees as a bargaining agent in such a situation" and, therefore, could not be said to breach any duty to those employees. *Id.* The Court made quick work of this argument. It noted that the union could refer work only by virtue of its status as a "Board-certified bargaining

representative," and "[t]ogether with this authority comes the responsibility to exercise it in a nonarbitrary and nondiscriminatory fashion." *Id.* at 87-88. In fact, the Court continued, because a union "wield[ed] additional power in a hiring hall by assuming the employer's role," power that could be easily "abuse[d]," a union's "responsibility to exercise that power fairly *increases* rather than *decreases*" in the hiring hall setting. *Id.* at 89.

The Court also explained that the duty itself "is an essential means of enforcing fully the important principle that 'no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers.'" *Id.* at 79 (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301 (1971)). And perhaps for this reason, the Court noted, albeit in *dicta*, that the Board had "found gender discrimination by unions to be an unfair labor practice," *id.* at 77, and it explained that the concept of an unfair labor practice is *narrower* than the duty of fair representation, *see id.* at 86 & n.10.

The lower courts have given further meaning to the duty of fair representation as it relates to hiring halls. *See, e.g.*, *NLRB v. Teamsters Gen. Local Union No. 200*, 723 F.3d 778 (7th Cir. 2013); *Plumbers &*

Pipefitters Local Union No. 32 v. NLRB, 50 F.3d 29 (D.C. Cir. 1995). Most apposite of all, in *Gilbert v. Country Music Association, Inc.*, the Sixth Circuit held that, although Title VII does not extend to claims of discrimination based on sexual orientation, the plaintiff, an openly gay member, had stated a claim for breach of his union's duty of fair representation when he was denied referrals on that basis. 432 Fed. App'x 516, 521 (6th Cir. 2011) (non-precedential). Writing for a unanimous court, Judge Sutton had little difficulty concluding that such "conduct at a minimum was arbitrary or in bad faith" and, thus, constituted a breach of the union's duty. *Id.* A similar outcome is warranted here.

2. Mr. Fowlkes Alleged that He Was Deprived of Referrals Based on Sex Stereotyping and Transgender Animus, and In Retaliation for Bringing a Prior Action Under Title VII.

Taken together, the well-pleaded allegations and inferences drawn from Mr. Fowlkes's amended complaint easily support a claim for breach of the union's duty of fair representation. He has alleged: (1) that he is a member of a union (J.A. 34-35, 49); (2) that the Defendants denied him referrals for which he was qualified (J.A. 45-47, 53, 55); and (3) that they did so on the basis of Mr. Fowlkes's gender

(gender stereotyping and transgender animus) and in retaliation for bringing a previous action for discrimination (J.A. 43-46, 49, 53, 55). This is the very definition of arbitrary, discriminatory, and bad faith conduct. *See Breininger*, 493 U.S. at 73; *Gilbert*, 432 Fed. App'x at 521; *see also NLRB v. Int'l Bhd. of Elec. Workers, Local Union 16*, 425 F.3d 1035, 1040 (7th Cir. 2005) ("A union is presumed to have breached its duty of fair representation if . . . it refuses to refer a member who is eligible under [a hiring-hall] agreement.").

B. Liberally Construed, the Amended Complaint Pleads Viable Claims for Retaliation under Title VII of the Civil Rights Act of 1964.

The amended complaint likewise supports claims for retaliation in violation of Title VII, and Mr. Fowlkes's failure to exhaust his administrative remedies is no impediment to bringing such claims. As explained below, this Court has recognized that there is no exhaustion requirement for claims of retaliation related to an earlier-filed EEO charge.

1. Mr. Fowlkes Pleaded Facts that Support a Retaliation Claim.

Under the Civil Rights Act of 1964, it is unlawful for "a labor organization to discriminate against any member thereof . . . because he

has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under" Title VII. 42 U.S.C. § 2000e–3(a). This Court has held that, to "state a claim for retaliation in violation of Title VII, a plaintiff must plead facts that would tend to show that: (1) she participated in a protected activity known to the defendant; (2) the defendant took an employment action disadvantaging her; and (3) there exists a causal connection between the protected activity and the adverse action." *Patane*, 508 F.3d at 115 (citing *Feingold v. New York*, 366 F.3d 138, 156 (2d Cir. 2004)).

The amended complaint includes factual allegations that satisfy each of the elements of a retaliation claim. Mr. Fowlkes alleged that he had initiated prior "legal p[roceedings]" under Title VII. J.A. 53; *see also* J.A. 31 (alleging that he had previously filed a charge of discrimination with the EEOC); J.A. 45 (referencing his prior "complaint" for discrimination). He also alleged that the Defendants were aware of these prior legal proceedings (J.A. 45-46, 53) and that they denied him referrals, at least in part, because he had initiated these proceedings (J.A. 45-46); *cf. Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1039 (2d Cir. 1993) (holding that the anti-retaliation

provision is violated when "a retaliatory motive plays a part in adverse employment actions toward an employee, whether or not it is the sole cause"). In addition, Mr. Fowlkes alleged that when he asked why he was not receiving referrals to which he was otherwise qualified to receive, Mr. O'Rourke said: "'[W]ell you're suing us.'" J.A. 45. And Mr. Doyle allegedly stated: "'[W]ell you shoud[n't have] sued us.'" J.A. 45. Finally, Mr. Fowlkes alleged that, from these statements, he believed—quite reasonably—that the Defendants were pressuring him to "drop[his prior] complaint." J.A. 45; *cf. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006) (holding that the anti-retaliation provision was meant to reach conduct that "could well dissuade a reasonable worker from making or supporting a charge of discrimination"). As a result, Mr. Fowlkes's allegations are more than sufficient to state a claim for retaliation under Title VII. *See Patane*, 508 F.3d at 115.

2. This Court Has Recognized that There Is No Exhaustion Requirement for Retaliation Claims that are Related to an Earlier-Filed EEO Charge.

Nor is Mr. Fowlkes's failure to exhaust his retaliation claims an impediment to prevailing upon them in this action. This Court has repeatedly held that where, as here, a prior charge of discrimination

has been filed with the EEOC, "'it would be unfair to civil rights plaintiffs to bar'" unexhausted claims "'alleging retaliation by an employer against an employee for filing [that] EEOC charge.'" *Terry v. Ashcroft*, 336 F.3d 128, 151 (2d Cir. 2003); *see also Richardson v. Comm'n on Human Rights & Opportunities*, 532 F.3d 114, 120 n.6 (2d Cir. 2008) (noting that the Court has "waived this administrative exhaustion requirement with respect to retaliation claims"); *Kirkland v. Buffalo Bd. of Educ.*, 622 F.2d 1066, 1068 (2d Cir. 1980) (per curiam) (similar).

There are many reasons for this exception to the exhaustion requirement. As this Court has explained, "to not allow such an exception would have the perverse result of rewarding the most egregious forms of retaliation." *Terry*, 336 F.3d at 151. "The more effective an employer was at using retaliatory means to scare an employee into not filing future EEO complaints, the less likely the employee would be able to hold the employer liable for that retaliation because the less likely the employee would risk filing an EEO complaint as to the retaliation." *Id.* "In addition, requiring a separate EEO filing [for retaliation claims] could have the perverse result of promoting

employer retaliation in order to impose further costs on plaintiffs and delay the filing of civil actions relating to the underlying acts of discrimination." *Id.* (quotation marks omitted).

In the present case, Mr. Fowlkes was not required to exhaust his retaliation claims. He has alleged that he filed earlier claims of discrimination with the EEOC (*see* J.A. 31, 45, 53), and he alleged that he was retaliated against because he asserted these prior claims (J.A. 45-46, 53).

At the very least, because the District Court never passed on Mr. Fowlkes's allegations of retaliation, let alone considered whether he was required to exhaust those claims, *see* J.A. 73-74, it would be appropriate to remand those claims to the District Court to determine, in the first instance, whether exhaustion was required and whether any equitable principles might excuse that requirement. That is the approach this Court took in *Fernandez*. *See* 471 F.3d at 59 (remanding because the district court did not consider "whether equitable principles excused [the plaintiff's] failure" to exhaust). It is equally warranted here.

C. Liberally Construed, the Amended Complaint Pleads Viable Claims for Discrimination Because of Sex Under Title VII.

Beyond his allegations of retaliation, Mr. Fowlkes has alleged that he was denied referrals based on gender stereotyping and transgender animus. Both constitute discrimination "because of . . . sex," 42 U.S.C. § 2000e–2(c)(2), and both are therefore actionable under Title VII.

The District Court did not consider the substance of these claims because, as noted above, it mistakenly believed that exhaustion is a jurisdictional requirement. *See* J.A. 73-74. As explained below, Mr. Fowlkes's failure to exhaust his discrimination claims may be excused under at least two equitable principles: the futility and reasonably-related doctrines.

1. Gender Stereotyping and Transgender Animus are Actionable Forms of Discrimination Because of Sex Under Title VII.

In addition to simple, gender-based discrimination—that is, discrimination because a woman is a woman or a man is a man—there are at least two other forms of discrimination because of sex that federal courts have deemed actionable: (1) discrimination based on gender stereotypes, and (2) discrimination based on animus towards

individuals who hold themselves out differently than their biological sex. This Court has not had occasion to address either as it relates to a transgendered individual. *Cf. Simonton*, 232 F.3d at 38 (declining to consider the merits of a sex-stereotyping claim raised by an openly gay plaintiff because he did "not [include] sufficient allegations" to allow the Court to "surmise that [the plaintiff] behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation"); *see also Dawson v. Bumble & Bumble*, 398 F.3d 211, 222-23 (2d Cir. 2005) (explaining that an openly lesbian plaintiff could not survive a motion for summary judgment on sex-stereotyping claims because she "produced no substantial evidence from which [the Court might] plausibly infer that her alleged failure to conform her appearance to [sex] stereotypes resulted in her suffering any adverse employment action at the hands of [the defendant]").

In the landmark decision of *Price Waterhouse v. Hopkins*, a majority of the Supreme Court recognized that discrimination based on gender-nonconforming behavior (*i.e.*, sex stereotyping) is an impermissible form of sex discrimination under Title VII. 490 U.S. at

250-51 (four-justice plurality); *accord id.* at 259-60 (White, J., concurring) (agreeing that the plaintiff could prove discrimination based on gender stereotypes); *id.* at 266 (O'Connor, J., concurring) (same). The plaintiff in that case, a female senior manager in an accounting firm, was denied partnership at least in part because she was considered "macho." *Id.* at 235. She was told that her chances for partnership would improve if she were to "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry." *Id.* (internal quotation marks omitted).

As the plurality explained, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse*, 490 U.S. at 251 (alteration and quotation marks omitted). Thus, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250.

Not surprisingly, the reasoning of *Price Waterhouse* has been extended to transgendered individuals. In *Smith v. City of Salem*, for example, the Sixth Circuit held that the plaintiff, a transgendered firefighter, had stated a claim for discrimination based on sex stereotyping under Title VII. 378 F.3d 566, 572 (6th Cir. 2004). The court noted that in *Price Waterhouse* "[s]ix members of the Court agreed that . . . Title VII barred not just discrimination because [the plaintiff] was a woman, but also sex stereotyping—that is, discrimination because she failed to *act* like a woman." *Id.* at 571-72. Applying that holding to the case before it, the Sixth Circuit held that "discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse*." *Id.* at 575; *see also Barnes v. City of Cincinnati*, 401 F.3d 729, 737-38 (6th Cir. 2005) (applying the holding of *Smith* to a preoperative male-to-female transgender police officer who brought a Title VII action after the City of Cincinnati discriminated against her because she failed to conform to sex stereotypes).

Other courts have taken a similar approach. *See, e.g.*, *Schroer v. Billington*, 577 F. Supp. 2d 293, 303-06 (D.D.C. 2008) (holding that the reasoning of *Price Waterhouse* applied to a case in which an employer revoked an offer of employment to an eminently qualified applicant after he revealed that he would be transitioning to a transgender woman); *Lopez v. River Oaks Imaging & Diagnostics Group, Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (similar); *cf. Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) (holding that "a government agent violates the Equal Protection Clause's prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity"); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287, 290-92 (3d Cir. 2009) (holding that an effeminate gay man who did not conform to his employer's vision of how a man should dress, speak, and act provided sufficient evidence of gender stereotyping under Title VII to survive a motion for summary judgment); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (holding that, under *Price Waterhouse*, a bank's refusal to give a loan application to a "biological male" because his "attire did not accord with his male gender" established a claim for illegal

discrimination on "'the basis of . . . sex'" under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f).

This Court should therefore hold, as a matter of first impression, that a transgender individual can state a claim for discrimination under Title VII based on gender stereotypes. Indeed, it has already suggested its agreement with such a holding. In *Dawson*, this Court stated, albeit in *dicta*, that Title VII sex discrimination claims may be based on an adverse employment decision resulting from an "employer's animus toward [an employee's] exhibition of behavior considered to be stereotypically inappropriate for [his or her] gender." 398 F.3d at 218. And in *Back v. Hastings On Hudson Union Free School District*, this Court held "that stereotypical remarks about the incompatibility of motherhood and employment" can support a claim for sex discrimination under the Equal Protection Clause. 365 F.3d 107, 122 (2d Cir. 2004).

In addition to discrimination based on sex stereotyping, there is another actionable (and related) form of sex discrimination: discrimination based on an individual's *change* in gender identification—*i.e.*, his or her mere status as transgender. This form of

gender-based discrimination is directed at individuals who hold themselves out differently than their birth sex. As Judge Robertson explained, discrimination because of a changed gender identity is no different than discrimination against a religious convert: Even if an employer "harbors no bias toward either Christians or Jews but only 'converts,'" discrimination of that sort is unquestionably "discrimination 'because of religion.'" *Schroer*, 577 F. Supp. 2d at 306; *cf. Glenn*, 663 F.3d at 1316 ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."). In short, discrimination because of a belief that *this person* should not be of a certain gender or religion is discrimination because of that status.

And yet, there are a handful of federal appellate courts that have held that transgender individuals, as a class, are beyond Title VII's protections. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084-86 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661-64 (9th Cir. 1977); *see also Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221-24 (10th Cir. 2007) (holding that discrimination based on an

individual's "status as a transsexual" is not actionable, and reserving decision on whether a sex-stereotyping claim "may extend Title VII protection to transsexuals who act and appear as a member of the opposite sex"). These courts have reasoned that an individual's status as transgendered somehow strips them of Title VII's protections against discrimination because of sex. *E.g.*, *Ulane*, 742 F.2d at 1085-86 (holding that transgender individuals, as a class, are not entitled to Title VII protection because "Congress had a narrow view of sex in mind" and "never considered nor intended that [Title VII would] apply to anything other than the traditional concept of sex"); *see also Etsitty*, 502 F.3d at 1222 ("In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based on their status as a transsexual."). These cases were wrongly decided.

As the Sixth Circuit cogently explained, virtually all of these cases were decided before the Supreme Court's decision in *Price Waterhouse*, and each took a narrow view of "sex"—*i.e.*, that "sex" refers only to "anatomical and biological characteristics," not "socially-constructed norms associated with a person's sex"—that has since "been eviscerated by *Price Waterhouse*." *Smith*, 378 F.3d at 572-73 (citing the relevant

portions of *Ulane*, *Sommers*, and *Holloway*); *see also Etsitty*, 502 F.3d at 1222 (defining the concept of sex narrowly to encompass discrimination against individuals only "because they are male or because they are female"). The Ninth Circuit has similarly concluded that this line of cases cannot be squared with *Price Waterhouse*. *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (explaining, in a case involving gender-motivated violence, that the "initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*"); *see also Schroer*, 577 F. Supp. 2d at 307 (criticizing those courts that have "allowed their focus on the label 'transsexual' to blind them to the statutory language itself").

Without question, *Price Waterhouse* "established that Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination[—]that is, discrimination based on a failure to conform to stereotypical gender norms." *Smith*, 378 F.3d at 573. Discrimination based on a *change* in gender identification is no different; it is "*literally* discrimination 'because of sex.'" *Schroer*, 577 F. Supp. 2d at 308.

Nor does it matter that Congress may not have specifically had in mind the obstacles that many transgendered men and women face—even in our modern society—when it enacted Title VII. As Justice Scalia wrote for a unanimous Court in a related context:

> [M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998). As a result, this Court should likewise hold that discrimination against an individual because he or she is transgender is, by definition, discrimination "because of . . . sex."

2. Mr. Fowlkes Alleged that He Was Deprived of Referrals Based on the Defendants' Conceptions of Gender Norms.

In the present case, the amended complaint includes allegations, and raises reasonable inferences, that Mr. Fowlkes suffered discrimination because of gender stereotyping and transgender animus. Specifically, Mr. Fowlkes has alleged that the Defendants denied him referrals based on gender stereotypes (*e.g.*, he didn't "act like a nice

girl," J.A. 53) and transgender animus (*e.g.*, he "used to be a nice quiet girl" but now holds himself out as a "guy," J.A. 43). Indeed, the allegations of gender-based animus are overwhelming:

- "'you used to be a nice quiet girl'" (J.A. 43);
- if you "acted with a femin[ine] character or worked with less musc[le]," you would have gotten more work (J.A. 44);
- you "'would get a good job if you would act like girl'" (J.A. 53); and
- you need "'to be nice'" and "'act like a nice girl'" (J.A. 53).

These allegations are more than sufficient to state a sex discrimination claim.

Moreover, unlike the plaintiffs in *Simonton* and *Dawson*, Mr. Fowlkes has not put his sexual orientation at issue. In other words, the alleged discrimination turns exclusively on the Defendants' stilted view of gender norms, not Mr. Fowlkes's sexual orientation. *See, e.g.*, J.A. 43, 53. In *Simonton* and *Dawson*, by contrast, the plaintiffs were both openly homosexual. Thus, although *Dawson* stated that the plaintiff's sexual orientation complicated the factual analysis, 398 F.3d at 218, no such complication exists here.[5]

[5] *Dawson* construed *Simonton* to warn that "a gender stereotyping claim *should not* be used to 'bootstrap protection for sexual orientation

At bottom, Mr. Fowlkes has alleged facts that would establish that the Defendants denied him referrals for an impermissible reason—"because of . . . sex," 42 U.S.C. § 2000e–2(c)(2). Those allegations are sufficient to state a claim under Title VII.

3. The District Court Erred in Holding that Exhaustion Is a Jurisdictional Defect Under Title VII.

The District Court never analyzed the merits of Mr. Fowlkes's claims of discrimination because, in its view, his failure to exhaust these claims deprived the court of subject-matter jurisdiction. J.A. 73-74; *see also* J.A. 22-24. But the District Court was mistaken. Title VII's exhaustion requirement is not jurisdictional and may be waived or

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into Title VII." *Dawson*, 398 F.3d at 218 (emphasis added) (quoting *Simonton*, 232 F.3d at 38). But *Dawson* took out of context *Simonton*'s point about bootstrapping. According to *Simonton*, the sex-stereotyping theory of gender discrimination in *Price Waterhouse* "*would not* bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine." *Simonton*, 232 F.3d at 38 (emphasis added). Thus, contrary to *Dawson*'s suggestion, *Simonton*'s statement was merely descriptive; it did not express a view that it would be impermissible for a homosexual male or female to bring a sex-stereotyping claim, *see Simonton*, 232 F.3d at 38. Moreover, other federal courts have held that an individual's sexual orientation does not necessarily defeat a gender-stereotyping claim. *See, e.g.*, *Prowel*, 579 F.3d at 290-92.

excused under a variety of equitable principles not considered by the District Court.

a. Title VII's Exhaustion Requirement Is Not Jurisdictional.

Title VII is rather unique in that it includes its own provision conferring subject-matter jurisdiction upon federal district courts. *See* 42 U.S.C. § 2000e–5(f)(3). As the Supreme Court explained, Congress included this stand-alone provision to skirt an amount-in-controversy requirement that existed in 28 U.S.C. § 1331 when the Civil Rights Act of 1964 was enacted. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 505 (2006) (noting that, in 1964, "[c]laims could not be brought under § 1331 unless the amount in controversy exceeded $10,000," and that Congress enacted Title VII's jurisdictional provision to avoid this threshold). After "Congress amended 28 U.S.C. § 1331 in 1980 to eliminate the amount-in-controversy threshold," Title VII's jurisdictional provision, 42 U.S.C. § 2000e–5(f)(3), has "served simply to underscore Congress'[s] intention to provide a federal forum for the adjudication of Title VII claims." *Id.* at 506. But this statement about Section 2000e–5(f)(3)'s diminished utility is a bit too simplistic.

The Supreme Court has used this statutory relic for another purpose—to confirm that Congress never intended to treat each of Title VII's many procedural hurdles as jurisdictional barriers to suit. Thus, in *Arbaugh*, the Court held that "the 15-employee threshold" that appears in the definition of an "employer," 42 U.S.C. § 2000e(b), was not a jurisdictional requirement in part because it did not appear in Title VII's jurisdictional provision. *Id.* at 515. Similarly, in *Zipes v. Trans World Airlines, Inc.*, the Court held that the time limit for filing charges under Title VII, 42 U.S.C. § 2000e–5(e), is not a jurisdictional prerequisite in part because that time limit was not included in Title VII's jurisdictional provision. *See* 455 U.S. 385, 393-94 (1982).

The provisions governing exhaustion are no different; they "appear[in] entirely separate provision[s], and [they do] not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Cf. Zipes*, 455 U.S. at 394. For this reason and others, this Court has repeatedly held that the failure to exhaust is not a jurisdictional bar, even where there is "a total failure to present a particular claim to the EEOC." *Francis*, 235 F.3d at 767; *see also*

Fernandez, 471 F.3d at 58 (similar); *Boos*, 201 F.3d at 182 (similar); *Pietras*, 180 F.3d at 474 (similar).

b. Mr. Fowlkes Is Entitled to Equitable Relief Under the Futility and Reasonably-Related Doctrines, or at the Very Least, Remand is Warranted.

As this Court recognized in *Fernandez v. Chertoff*, because the failure to exhaust is "not a jurisdictional defect, it is subject to equitable [considerations]." 471 F.3d at 58. In the present case, there are at least two equitable principles that are available to Mr. Fowlkes that would excuse his failure to exhaust: the futility and reasonably-related doctrines.

The futility doctrine is a well-established exception to the requirement of administrative exhaustion, including in situations "where it appears that [an] agency has 'taken a firm stand.'" *E.g.*, *Skubel v. Fuoroli*, 113 F.3d 330, 334 (2d Cir. 1997) (quoting *Brown v. Sec'y of HHS*, 46 F.3d 102, 114-15 (1st Cir. 1995)). What is more, this Court has treated futility as an available form of relief from Title VII's exhaustion requirement. *See Fernandez*, 471 F.3d at 58 (explaining that "exhaustion of administrative remedies is not required if adequate remedies are not reasonably available"). And other courts have reached

the same conclusion. *Harris v. U.S. Att'y Gen.*, 657 F. Supp. 2d 1, 13 (D.D.C. 2009) (holding that exhaustion was futile because, had the plaintiff "initiated EEO counseling within the designated time period, it would have made no difference because [the defendant agency] believed that [the] plaintiff was not a federal employee"); *DeFigueiredo v. Trans World Airlines, Inc.*, 322 F. Supp. 1384, 1387 (S.D.N.Y. 1971) (holding that exhaustion was not required because claims similar to the plaintiff's were "processed by the Commission but decided adversely to his position"); *cf. Bowden v. United States*, 106 F.3d 433, 439 (D.C. Cir. 1997) ("What we have repeatedly stated regarding Title VII exhaustion requirements applies here as well: They are practical and pragmatic and should not be invoked when they serve no practical purpose." (brackets, ellipses, and quotation marks omitted)).

In the present case, the exhaustion of administrative remedies would have been futile. When Mr. Fowlkes filed his original and amended complaints in the District Court—on July 29 and November 29, 2011, respectively—the EEOC had taken a firm stand: "personnel actions adversely affecting transsexuals are not discriminatory based on sex because such actions are not the result of the individual's status as

male or female, but rather the result of the change from one sex to another." *Casoni v. U.S. Postal Serv.*, Appeal No. 01840104, 1984 WL 485399, at *1 (E.E.O.C. Sept. 28, 1984); *Labate v. U.S. Postal Serv.*, Appeal No. 01851097, 1987 WL 774785, at *2 (E.E.O.C. Feb. 11, 1987) (finding that "appellant's claim of discrimination based on sex (transsexual) is not within the purview of our Regulations"). And even after *Price Waterhouse*, the Commission stated that it had "repeatedly found that transsexual [status] is not a protected basis under Title VII." *Balmes v Daley*, Appeal No. 01A05006, 2000 WL 34329672, at *2 (E.E.O.C. Aug. 25, 2000); *Kowalczyk v. Brown*, Appeal No. 01942053, 1994 WL 744529, at *2 (E.E.O.C. Dec. 27, 1994) (finding that the "appellant's allegation of discrimination based on her acquired sex (transsexualism) is not a basis protected under Title VII"); *see also Campbell v. Espy*, Appeal No. 01931730, 1994 WL 652840, at *1 (E.E.O.C. July 21, 1994) (denying the appellant's request for reconsideration and reaffirming that discrimination "on the basis of disability (gender dysphoria)" is not actionable under the Rehabilitation Act).

It was only on April 20, 2012—after Mr. Fowlkes filed his complaints—that the EEOC recognized that a transgendered individual could bring claims for sex stereotyping and transgender animus under Title VII. *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at *1 (E.E.O.C. Apr. 20, 2012) (finding that a "complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII"). Thus, the EEOC clarified that, through this decision, it "expressly overturn[ed] . . . any contrary earlier decisions from the Commission." *Id.* at 11 n.16 (citing and thereby overturning *Casoni*, *Campbell*, and *Kowalczyk*). Given the EEOC's steadfast position that discrimination based on transgender status did not constitute sex discrimination prior to 2012, it would have been futile for Mr. Fowlkes to file an EEO charge asserting claims that related to his transgender status.

In addition to the futility doctrine, Mr. Fowlkes may be able to avail himself of the reasonably-related doctrine to excuse his failure to exhaust. That doctrine is available where, as may be the case here, the defendants' more-recent discriminatory conduct was "carried out in precisely the same manner alleged" by the plaintiff in an earlier-filed

EEO charge. *See, e.g.*, *Butts v. City of New York Dep't of Hous. Pres. & Dev.*, 990 F.2d 1397, 1402-03 (2d Cir. 1993); *see also Almendral*, 743 F.2d at 967 (permitting a later claim based on "essentially the same" act of discrimination included in an earlier-filed charge). This exception is premised on the assumption that "the EEOC would have had the opportunity to investigate, if not the particular discriminatory incident, the method of discrimination manifested in prior charged incidents." *Butts*, 990 F.2d at 1403.[6]

Mr. Fowlkes has alleged that he filed prior "legal p[roceedings]" under Title VII based on similar incidents of gender discrimination—*i.e.*, the denial of referrals based on gender. J.A. 53; *see* J.A. 31 (alleging that he had previously filed a charge of discrimination with the EEOC); J.A. 45 (referencing his prior "complaint" for discrimination); *see also* J.A. 18, 69-70 (discussing Mr. Fowlkes's prior charge of discrimination). To the extent that Mr. Fowlkes was required to plead that he had exhausted his more recent claims, these allegations should be deemed

[6] *Butts* "referred, in passing to Title VII's exhaustion requirements as a matter of 'jurisdiction,'" but as this Court reiterated in *Francis*, "'the failure to exhaust administrative remedies is a precondition to bringing a Title VII claim in federal court, rather than a jurisdictional requirement,'" *Francis*, 235 F.3d at 767-68, and therefore may be waived or excused based on equitable principles.

sufficient to establish that he might ultimately be able to avail himself of the reasonably-related doctrine.[7]

In any event, because the District Court believed that Mr. Fowlkes's failure to exhaust these more recent claims was a jurisdictional impediment to suit, it never considered whether equitable principles excused Mr. Fowlkes's failure to exhaust his administrative remedies. J.A. 73-74. In a similar circumstance, this Court held that, at the very least, "remand" is "in order." *Fernandez*, 471 F.3d at 59. That holding applies with equal force here.

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[7] It is not even clear that Mr. Fowlkes was required to plead that he had exhausted his administrative remedies. This Court appears to have held that the failure to exhaust is an affirmative defense and should be raised by defendants "in their answer." *Francis*, 235 F.3d at 768 (finding waiver after the defendant waited to raise the plaintiff's failure to exhaust "until after judgment had been entered" following a jury verdict); *Briones v. Runyon*, 101 F.3d 287, 290 (2d Cir. 1996) ("[T]he statutory requirement [of timely administrative exhaustion] is analogous to a statute of limitations and is, therefore, considered subject to waiver, estoppel, and equitable tolling."); *see also Jenkins v. Haubert*, 179 F.3d 19, 28-29 (2d Cir. 1999) (holding that, under the Prison Litigation Reform Act (PLRA), the failure to exhaust serves as an "affirmative defense" that must be raised by the defendant). What is more, the Third Circuit has held that because the "failure to exhaust is an affirmative defense to be pleaded by the defendant," it should not form the basis of a *sua sponte* dismissal. *E.g.*, *Ray v. Kertes*, 285 F.3d 287, 295-97 (3d Cir. 2002) (PLRA case); *see also Bowden*, 106 F.3d at 437 (noting that, under Title VII, "untimely exhaustion of administrative remedies is an affirmative defense").

II. BECAUSE THERE IS FEDERAL-QUESTION JURISDICTION, THIS COURT SHOULD REVERSE THE DISMISSAL OF MR. FOWLKES'S PENDENT STATE-LAW DISCRIMINATION CLAIMS.

If this Court concludes that Mr. Fowlkes has included factual allegations that support at least one viable federal cause of action, then this Court should reinstate Mr. Fowlkes's pendent state-law claims for discrimination. Indeed, because the elements of a claim for discrimination under Title VII are "analytically identical" to Mr. Fowlkes's pendent claims under New York law, *Bucalo v. Shelter Island Union Free Sch. Dist.*, 691 F.3d 119, 123 n.1 (2d Cir. 2012), to the extent that he has stated a claim under the former, he has necessarily stated a claim under the latter. As a result, the District Court would be permitted to assume jurisdiction over Mr. Fowlkes's pendent (and viable) state-law claims pursuant to 28 U.S.C. § 1367. *See, e.g.*, *Weixel v. Bd. of Educ. of City of N.Y.*, 287 F.3d 138, 151-52 (2d Cir. 2002) ("In addition, because plaintiffs' amended complaint pleads viable federal claims, their supplemental state law claims should not have been dismissed pursuant to 28 U.S.C. § 1367(c).").

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the District Court and remand the case with instructions that the amended complaint be served upon the Defendants.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i), I hereby certify that that the foregoing Appellant's Brief is proportionately spaced; uses a Roman-style, serif typeface (Century Schoolbook) of 14-point; and contains **11,183 words**, exclusive of the material not counted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellant's Brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on January 15, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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